IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1435

TEXACO INC., STANDARD OIL COMPANY (INDIANA), THE SUPERIOR OIL COMPANY, INC., EXXON CORPORATION, SHELL OIL COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

(List of Counsel Appears on Inside Cover)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioners Texaco Inc., Standard Oil Company (Indiana), The Superior Oil Company, Inc., Exxon Corporation and Shell Oil Company pray that a writ of certeriorari issue to review the February 23, 1977, judgment of a four-judge majority of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc.*

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit, sitting *en banc*

(Bazelon, C.J.), including the ninety-six page dissenting opinion, is not yet officially reported, but is reproduced in the appendix herein at A. 1-164.[1] The August 8, 1975, judgment and opinion of a unanimous panel of the Court of Appeals for the District of Columbia is reported at 517 F.2d 137, and is reproduced in the appendix herein at A. 209-58. The order of the District Court for the District of Columbia is set forth as an appendix to the *en banc* decision of the Court of Appeals and is reproduced herein at A. 56-64.

JURISDICTION

The final *en banc* judgment and opinion of the court of appeals was entered on February 23, 1977. The time for filing this petition for a writ of certiorari does not expire until May 24, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the four-judge majority of the *en banc* court of appeals erred in holding, contrary to the decisions of the district court and the unanimous panel, and contrary to previous decisions of this Court and other circuits, that the doctrine of administrative collateral estoppel is inapplicable in a subpoena enforcement proceeding, thereby rendering the courts powerless to prevent one federal agency from investigating, relitigating and collaterally attacking major fact issues previously fully litigated and decided by another federal agency.

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[1] The dissenting opinion is set forth in the appendix at A. 69-164. On March 24, 1977, the Majority issued an order modifying its original opinion by adding thereto a lengthy footnote. That order is set forth in the appendix at A. 165-68.

2. Whether the four-judge majority of the *en banc* court of appeals applied improper standards of appellate review in derogation of apposite decisions of this Court, and in conflict with the appellate standards of review utilized by other circuits: (a) by setting aside the district court's factually based modifications to Respondent's investigative subpoena, despite the acknowledged absence of any clearly erroneous findings or abuse of discretion on the part of the district court; (b) by vacating the unanimous panel's decision holding that the district court had not abused its discretion or made clearly erroneous findings, and (c) by reviewing *de novo* the reasonableness and lawfulness of Respondent's investigative subpoena and thereby substituting its own judgment for the judgment of the district court as to disputed factual matters.

STATUTE INVOLVED

This case involves the enforceability of certain portions of a Federal Trade Commission investigative subpoena *duces tecum* issued pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49 (1970).

SUMMARY OF ARGUMENT

This petition seeks review of a decision of a four-judge majority of the Court of Appeals for the District of Columbia, sitting *en banc*, reversing the decision of the district court (after vacating the unanimous decision of a panel upholding the district court) and enforcing subpoenas issued by the Federal Trade Commission. On the basis of an evidentiary record and after receiving extensive briefing and argument, the district court ordered enforcement of most of the subpoena specifications, modifying in part six of the twelve specifications. The rulings of the district court were based upon considerations of administrative collateral estoppel, bur-

den and relevance. Thereafter, a unanimous panel[2] of the Court of Appeals affirmed (with one modification) the enforcement order of the district court. On petition by the Federal Trade Commission for rehearing *en banc*, the judgment of the unanimous panel was vacated and the holdings of the district court were reversed by a four-judge majority of the *en banc* court.[3]

The majority opinion below is contrary to rulings of this Court and created a conflict with decisions of other circuits in its holding that a federal agency (the Federal Trade Commission) may not be estopped from seeking to investigate, relitigate and collaterally attack precisely the same factual findings resolved in a contested proceeding by another federal agency (the Federal Power Commission) fully vested with jurisdiction and expertise to hear and decide that factual issue.[4]

Moreover, the four-judge majority made no determination that the district court had made any clearly erroneous findings or abused its discretion in fashioning an order (based on those findings) modifying and enforcing Respondent's investigative subpoena. Instead, the majority reviewed the entire case *de novo*, including disputed

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[2] The panel included Circuit Judges Wilkey and MacKinnon and District Judge Jameson, the latter sitting by designation pursuant to 28 U.S.C. § 294(d).

[3] The majority of the *en banc* court consisted of Chief Judge Bazelon, joined only by Judges Wright, Leventhal and Robinson. Judge Wilkey filed an exhaustive ninety-six page dissent joined by Judge MacKinnon. Judges McGowan, Tamm and Robb recused themselves and played no part in the decision of this case.

[4] *United States* v. *Utah Construction Co.*, 384 U.S. 394 (1966); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 391 (1940); *FTC* v. *Miller*, 1977-1 Trade Cas. ¶ 61,265 (7th Cir. Jan. 24, 1977); *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970); *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944); *George H. Lee Co.* v. *FTC*, 113 F.2d 583 (8th Cir. 1940).

factual issues, and on the basis of that review substituted its judgment for the judgment of the district court as to the disputed factual questions of burden and relevance. In so doing, the Majority seriously departed from the accepted and usual standards of appellate review mandated by decisions of this Court [5] and followed by the various Circuits.[6]

STATEMENT OF THE CASE

A. Federal Power Commission Proceedings

Because the issues in this case are directly related to certain issues previously raised and determined in contested proceedings before the Federal Power Commission ("FPC"), it is necessary first to summarize those proceedings.

Beginning in the early 1960's, the FPC undertook to establish area-wide natural gas rates for Southern Louisiana in a proceeding involving dozens of producers, shippers and municipal purchasers of natural gas.[7] These proceedings resulted in the tentative establishment of rates for the sale of natural gas in that area (*So La I*).[8]

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[5] *United States* v. *Nixon*, 418 U.S. 683, 702 (1974); *NLRB* v. *Pipefitters Local 638*, —— U.S. —— (1977); 45 U.S.L.W. 4144, 4150 (February 22, 1977); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 330 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 141-43 (1973).

[6] *Lowes* v. *Pan-American Life Ins. Co.*, 355 F.2d 433, 436 (8th Cir. 1966); *Shasta Minerals & Chemical Co.* v. *SEC*, 328 F.2d 285, 288 (10th Cir. 1964); *Sue* v. *Chicago Transit Authority*, 279 F.2d 416, 419 (7th Cir. 1960); *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945); *Shotkin* v. *Nelson*, 146 F.2d 402, 404 (10th Cir. 1944); *Delno* v. *Market Street Ry.*, 124 F.2d 965, 967 (9th Cir. 1942).

[7] The proceedings were initiated by order of the FPC on May 10, 1961. 25 F.P.C. 942 (1961).

[8] Area Rate Proceeding (Southern Louisiana Area), 46 F.P.C. 1091 (October 23, 1968), *rehearing granted*, 40 F.P.C. 1091 (October 23, 1968), *opinion on rehearing*, 41 F.P.C. 301 (March 20,

However, before any order establishing new rates became final, the tightening natural gas supply situation became more apparent and pronounced and the FPC (and the Fifth Circuit Court of Appeals) became concerned that the tentative new rates would be ineffective in securing sufficient gas supplies. This concern led to the initiation of a second proceeding (*So La II*),[9] in which the FPC set out specifically to examine natural gas supply questions and more recent unit cost data.

The supply issue was crucial to the new proceeding. In the natural gas industry and in ratemaking proceedings before the Federal Power Commission, supply is measured in terms of "proved reserves" which consist of those portions of a natural gas reservoir which are known to exist as a result of actual drilling.[10] Until portions of natural gas reservoirs are shown by actual drilling to come within the category of "proved reserves," any label characterizing them as "reserves"; however speculative,[11] is a misnomer because it is not until the reservoir or portions of it are "proved" that the reservoir is known with any degree of reliability to contain estimable quantities of natural gas.

1969), *aff'd sub nom. Austral Oil Co.* v. *FPC*, 428 F.2d 407 (5th Cir.), *aff'd per curiam on rehearing*, 444 F.2d 125 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970).

[9] Area Rate Proceeding (Southern Louisiana Area), 46 F.P.C. 4 (July 16, 1971), *aff'd sub nom. Placid Oil Co.* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974).

[10] The full text of the definition of proved reserves which is used by the Power Commission and the industry is reproduced at A. 5, n.2.

[11] Natural gas producers may also refer to suspected natural gas reserves as "speculative," "possible," "probable," "recoverable," or "ultimately recoverable"—but there is no accepted use or definition of those terms by the industry. Only proved reserves are consistently defined, and only proved reserves are reported to the American Gas Association.

During the years in question, the only body which collected and reported proved reserves was the American Gas Association ("AGA")[12] which began collecting proved reserves data in 1946. Employees of petitioners serving on AGA committees (with the exception of Superior) regularly reported proved reserves—and *only* proved reserves—to the AGA. The Federal Power Commission, in turn, utilized these AGA proved reserves estimates in computing rates for natural gas in two ways. First, the FPC utilized the AGA reserves estimates, together with other data available to it, to estimate the impact of its rate structure on supply. Second, the FPC utilized the AGA reserves estimates as one of the components of its formula to estimate the unit cost of finding and producing natural gas. As costs are estimated on a *unit* basis, only those reserves actually proved by drilling are appropriate in calculating the cost of finding such reserves.[13]

At the inception of the *So La II* proceedings in March, 1969, the accuracy of the "proved reserves" data reported by the AGA surfaced as a fullblown factual issue. Municipal consumers charged that producers were deliberately withholding natural gas in order to fabricate the appearance of a shortage; that "actual or threatened withholding of gas was being used to coerce parties to

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[12] The AGA, a trade association of produecrs, distributors and marketers of natural gas, is recognized as the principal source of authoritative statistical data concerning the natural gas industry.

[13] *See, e.g., Shell Oil Company* v. *FPC*, 520 F.2d 1061, 1068 (5th Cir. 1975), *cert. denied, sub nom California Co.* v. *FPC*, 426 U.S. 941 (1976), where in explaining the FPC's complex cost formula the Court stated that "the Commission would divide the number of feet drilled in a given year which resulted in finding non-associated natural gas into the non-associated natural gas reserves discovered as a result of such drilling." In making this computation, the Power Commission "used the only information available to it for reserve additions, the American Gas Association reserve studies and the various footage compilations." *Id.* at 1068.

FPC proceedings to modify their positions"; and that any such threat would be a "violation . . . of the Federal antitrust laws" which the FPC was obliged to investigate.[14]

The accuracy of AGA proved reserves data having been placed in sharp controversy, the FPC directed that a full evidentiary record be made on the reserves data question,[15] and ordered a spot audit of producers' gas reserves estimates in the Southern Louisiana area.[16] The FPC staff members in charge of the *So La II* audit then appeared and testified in detail concerning the methods and procedures followed in performing the audit. Other FPC staff experts testified as to the reliability of AGA reserve data. The evidence was developed in an adversarial proceeding in which public and private representatives participated at all stages.[17] Witnesses were subjected to rigorous cross-examination, and opportunity was provided for rebuttal testimony and evidence.

The FPC issued its opinion on July 16, 1971, wherein it considered and analyzed extensive evidence and arguments on the contention that reserves data were falsified and that producers had engaged in under-reporting to the AGA. 46 F.P.C. 86. *See, e.g.*, 45 F.P.C. 1213. Dealing point-blank with the question of the validity of AGA data, the FPC made specific findings that the AGA re-

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[14] 41 F.P.C. 378.

[15] 42 F.P.C. 1110, 1112-13.

[16] 43 F.P.C. at 445; 46 F.P.C. at 114.

[17] In addition to the FPC staff, a group of municipal distributor intervenors and the Public Service Commission of New York participated actively in the proceeding. 428 F.2d at 414. The Federal Trade Commission itself was provided an opportunity to intervene in the FPC proceedings, but declined. Memorandum of FTC's Office of Policy Planning and Evaluation. *Hearings Before the Senate Committee on Commerce*, "Natural Gas Regulation," 92d Cong., 2d Sess. 362 (1972).

serves data had not been impeached or substantially contradicted, 46 F.P.C. at 113, and were reasonably reliable for rate-making purposes, *id.* at 116.

On appeal to the Court of Appeals for the Fifth Circuit, the reliability of AGA proved reserves data was challenged anew. Broadside charges were made that the FPC had erred in relying on the data, that the FPC had deliberately been misled, and that the data were falsified and inaccurate. But the Court of Appeals found no basis for any such claims and fully approved the FPC's reliance on AGA data, noting that "an energy supply shortage" in fact existed. 483 F.2d at 894-95 n.13. This Court affirmed the Fifth Circuit, expressly endorsing the FPC's assessment of the supply situation and its finding of a "serious and growing domestic gas shortage." 417 U.S. at 320.[18]

B. The FTC Subpoenas

In mid-1971, just as the Power Commission was completing the proceedings described above, the Federal Trade Commission, having declined to intervene in the FPC proceeding, began its own formal investigation into the reporting of proved natural gas reserves in Southern Louisiana. In fact, the FTC investigation arose as a result of the FPC's *So La II* proceedings. In reaction to the "false shortage" allegations in *So La II*, the late Senator Philip A. Hart, Chairman of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, wrote to then Commissioner McIntyre of the FTC, claiming that natural gas producers may be withholding information on gas reserves in order to obtain higher rates from the FPC. Senator Hart "recommended" that the

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[18] Challenges to the use of the AGA reserves estimates by the FPC continued in subsequent cases, and were uniformly rejected by the FPC and the courts on appeal. See discussion *infra* at 18.

Commission conduct an investigation of these allegations of under-reporting.[19]

Accordingly, on June 5, 1971, the FTC issued a resolution authorizing the use of compulsory process in furtherance of a non-public investigation relating to the possibility that certain producers of natural gas were underreporting proved natural gas reserves estimates to the AGA.[20] Thereafter, on November 24, 1971, the subpoenas *duces tecum* here at issue were issued to eleven natural gas producers, including Petitioners.[21] Motions to quash the subpoenas were timely filed with the Federal Trade Commission in December 1971 and, seven

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[19] That the FTC felt compelled to undertake the investigation, and that the FTC realized it would be intruding upon the FPC's domain in carrying it out are clear from the testimony of Commissioner Paul Rand Dixon before the House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, April 14, 1976. Speaking on behalf of the FTC, Commissioner Dixon testified as follows:

> Mr. Dixon. I was on the Commission when the request came down that we institute this investigation or this study and report. I was uncomfortable, and I didn't like it. I so indicated by my attitude on the record when we got the report because I thought that we were being asked really to oversight a so-called regulatory agency. Federal Power has the authority to get this; it's not our job; it's theirs.
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> * * * *
>
> Mr. Dixon. We had a duly authorized committee of the Judiciary Committee of the Senate ask us to do this. Usually when it comes that direct from a standing committee, it's kind of a command to us. It isn't a request; it's kind of like being in the military when a higher officer in the Navy requested you to do something, that was an order; you didn't ask if he was serious or not. Subcommittee hearings on "Oversight-Regulatory Reform Hearings on the Federal Trade Commission," April 14, 1976, Tr. at 2-5.

[20] The Commission's resolution is set forth in the Appendix at A. 287-88.

[21] The subpoena comprised some twelve specifications denominated "A" through "L." The subpoena is set forth in full as Appendix "A" to the *en banc* majority opinion and at A. 46-55 of the Appendix hereto.

months later, on June 27, 1972, the FTC denied the motions,[22] stating, among other things, that the data were essential to enable the FTC "to determine the accuracy of such estimates [of proved reserves]."[23] On June 4, 1973, the Commission initiated enforcement proceedings in the United States District Court for the District of Columbia.[24]

C. The District Court Proceedings

On June 7, 1973, the district court issued orders to show cause why the FTC subpoenas should not be enforced. Thereafter, extensive evidentiary materials and briefs were filed by each side, and a full hearing was had on December 13, 1973. Based upon facts found in the course of the hearings, and based upon the evidentiary materials submitted, on March 22, 1974, the district court issued one order directed to six of the companies and a second order directed to the seventh company.[25] The district court found that certain of the documents called for by the subpoena were simply not relevant to the purpose of the FTC investigation, as that purpose had been evidenced in the Commission's resolution, in Com-

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[22] The FTC decision denying the motions to quash is set in the Appendix at A. 258-86. It should be noted that Petitioners were never given access to the papers or arguments in opposition to their motions to quash prepared by the FTC staff.

[23] A. 272. The FTC openly stated that the purpose of the investigation was to see if the FPC had been "hoodwinked" by the producers into accepting inaccurate proved reserve data. See Volume II of the Joint Appendix before the Court of Appeals at 240a, 359a-60a, 382a-83a.

[24] Following the Commission's denial of the motions to quash, two producers agreed to comply fully with the subpoenas and one agreed to comply in part. Shortly after the FTC filed its petitions for enforcement, another firm agreed to comply with the subpoena.

[25] As to Superior, the court enforced eight of the twelve subpoena specifications and quashed the remainder *in toto*. As to Exxon, Mobil, Shell, Amoco, Texaco and SoCal, the court enforced in full six of the FTC's twelve specifications, and the other six with certain modifications.

mission statements to Congress and in representations to the court.[26] Thus, the court found the FTC's investigation to be based on the theory that the reporting of *proved* reserves through participation in the AGA's reporting activities may have resulted in reporting errors or distortions through collusive action. In light of the FTC's concern with reporting of proved reserves to the AGA, the subpoena was generally limited to materials pertinent to proved reserves.

The court also found that full compliance with the subpoena would be unduly burdensome to petitioners, not only because of the subpoena's breadth, but because of the duplication of effort (burden) that would result in light of the Power Commission's prior proceedings in *So La II* and subsequent investigations.

The district court also held that, while it was appropriate for the FTC to investigate collusive conduct, the FTC was estopped from using the material subpoenaed for the purpose of seeking to upset or otherwise relitigate the factual issues of the accuracy of AGA proved natural gas reserves data for the years under investigation, inasmuch as the Federal Power Commission had previously considered and ruled upon that precise issue. The district court's order contained no limitation on the FTC's ability to investigate the existence *vel non* of a conspiracy among the producers.

D. The Opinion of a Panel of the Court of Appeals

The FTC appealed the decision of the district court, and on August 8, 1975, the appeals panel issued its unanimous decision affirming the district court's order, with the ex-

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[26] The district court found the resolution, standing alone, to be incomprehensible and unsatisfactory as a basis for determining relevance and thus sought clarification from FTC counsel. In response, the FTC stated that its purpose was to investigate "possible collusive conduct by the natural gas producers in the reporting of these [proved] reserves." *See* Dissenting Op. at 28 (A. 96).

ception of one item on time periods. The remaining modifications to the FTC's subpoena were affirmed by the panel, which specifically found that the district court:

> (1) committed no error in refusing to enforce those portions of the subpoenas calling for documents not related to estimates of proved reserves;
>
> (2) did not abuse its discretion in (a) limiting production of documents to a random sample of fields, (b) attaching conditions to disclosure, or (c) permitting documents to be produced for inspection at their situs;
>
> (3) was entitled to conclude, on the existing record, that (a) the FPC, on the basis of a contested evidentiary hearing, had found that the industry's reported statistics for Southern Louisiana proved natural gas reserves for the relevant years were accurate, (b) the FTC desired proved reserves data in the producers' possession in order independently to recompute the industry's reported statistics for Southern Louisiana proved reserves, and (c) it would be unjust and unreasonable to require the production of every scrap of data which related to reserves of *any* kind, and,
>
> (4) appropriately applied the doctrine of collateral estoppel to limit the Commission's use of the subpoenaed materials.

In October, 1975, more than two months after the unanimous decision and order of the panel, the FTC filed with the Court of Appeals a Petition for Rehearing and Suggestion for Rehearing *En Banc*, alleging error in the following three respects: (1) the panel's opinion misconstrued applicable case law to collaterally estop the FTC from *gathering* information, (2) the panel mistakenly applied "collateral estoppel" principles to restrict the FTC's *use* of subpoenaed documents, and (3) the panel mistakenly upheld restrictions on the FTC's *use* of the

materials imposed by the district court designed to assure confidentiality of the subpoenaed materials.[27]

On February 6, 1976, the unanimous opinion and order of the panel was vacated and the case was set down for rehearing *en banc* with Circuit Judges McGowan, Tamm and Robb not participating.[28]

E. The En Banc Opinion of the Court of Appeals

Supplemental briefs were filed dealing primarily with the collateral estoppel issue and other issues specified by the *en banc* court in a letter dated March 16, 1975, to the parties.[29] On April 19, 1976, argument was had before a diminished *en banc* court of appeals. At the oral argument, Circuit Judge Wright and Chief Judge Bazelon conceded that they had trouble comprehending the complex issues and ordered the parties to meet and attempt a resolution of the issues dividing them.[30] Two days later, the court formally ordered the parties to file a stipulation "stating precisely (1) the issues on which they have agreed, and (2) the issues which remain to be resolved by the court." Such a stipulation was filed, and is reproduced in the Appendix hereto at A. 171-89.[31]

On February 23, 1977, the court of appeals issued its opinion and order. The four-judge majority, speaking through Chief Judge Bazelon, went beyond the three issues posited by the FTC as a basis for *en banc* review and reversed virtually all of the district court's deter-

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[27] The Majority went beyond these questions in its disposition of the case, *see* discussion *infra* at 14-15.

[28] The order vacating the panel's opinion and ordering the case set down for rehearing *en banc* is reproduced in the Appendix at A. 207-08.

[29] The letter is reproduced in the Appendix at A. 204-06.

[30] Transcript of Argument at 86-87.

[31] Superior filed a separate stipulation reproduced in the Appendix at A. 190-97.

minations, enforcing the subpoenas as originally issued with the exception of certain modifications proposed by the FTC.

On March 8, 1977, the producers moved the court of appeals for a stay of the court's mandate and enforcement order to permit the producers to petition this Court for a writ of *certiorari*. That motion was granted on April 1, 1977, staying the mandate to and including April 18, 1977 (A. 169-70).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Decided an Important Federal Question Affecting All Administrative Agencies and Those They Regulate So as to Cast Doubt Upon the Status of Administrative Subpoenas, Their Reviewability by the District Courts, and the Interrelationships Among Agencies with Overlapping Jurisdictions

1. The parties are in agreement that the decision below presents questions of "exceptional importance to all federal regulatory agencies." [32] In papers filed by the Commission seeking extensions of time within which to file for rehearing, FTC counsel represented that:

> The Court's holding deals with important aspects of the Commission's investigatory powers and it is of marked significance and importance to the Commission's work and the statutes it enforces.[33]

And, on September 22, 1975, in support of a further request for time to draft its petition for rehearing, the

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[32] The FTC so characterized the issues in its Petition for Rehearing and Suggestion for Rehearing *En Banc*. Indeed the issues presented had to meet this standard under Rule 35(a) of the Federal Rules of Appellate Procedure in order to warrant rehearing *en banc*.

[33] Affidavit of Robert E. Duncan, dated August 15, 1975, at 2, attached to Motion by Appellant Federal Trade Commission for an Order Extending the Time for the Filing of a Petition for Rehearing and a Suggestion for Rehearing *En Banc* filed on or about August 15, 1975.

FTC again emphasized the extreme importance of the issues presented:

> In support of this motion, counsel states that the panel's decision in this case is one of potentially great importance in its application of the doctrine of collateral estoppel to bar one independent regulatory agency (the FTC) from investigating matters previously involved in proceedings before another regulatory agency (the FPC). In view of the potential impact of the panel's ruling on the investigative efforts of all federal regulatory agencies, commissions, and boards, it was necessary for the Department of Justice to consult with every major regulatory agency before deciding whether to seeking [sic] rehearing *en banc*.[34]

The significance of the issues is as compelling now as before. The court's decision is as important to parties subject to administrative subpoenas and facing multifaceted regulation as it is to the agencies charged with that regulation. "[D]eferring consideration [of the impact of collateral estoppel] does violence to the sound policy justifications underlying the doctrine." [35]

The lower court has created a serious likelihood of recurring interagency conflict. Thus, by rendering nugatory the doctrine of administrative collateral estoppel insofar as that doctrine would otherwise preclude one agency from reinvestigating and collaterally attacking factual findings properly arrived at by another agency through adversary proceedings, the court has created an environment which, unless checked by this Court, will effectively frustrate the "need for a consistent and final determination" of a technical issue by the "expert agency." [36]

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[34] FTC Motion for a Ten (10) Day Further Extension of Time Within Which to Seek Rehearing, filed on or about September 22, 1975, at 1.

[35] Dissenting Op. at 72 (A. 140).

[36] Dissenting Op. at 73 (A. 141).

That this issue should be considered at the investigatory stage is important to the policy of "ensur[ing] that judicial and administrative resources, as well as the resources of the litigants will not be wasted needlessly." [37] Early consideration of estoppel principles in no way "stymie[s] [o]r prohibit[s]" any second investigation, but instead properly steers it away from those areas where reinvestigation would be impermissible and improper.[38] Moreover, if the lower court's majority view were to prevail, the fact that two agencies might be engaged in the same factual investigation could not properly be considered by a district court in evaluating a claim of unreasonable burden by the recipient of an agency subpoena, even aside from considerations of collateral estoppel.[39]

The implications of the decision below on Federal Power Commission decisions, standing alone, are significant. Since this Court's holding in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Power Commission has repeatedly relied upon the accuracy and reliability of

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[37] *Id.*

[38] *Id.*

[39] The implication of this holding for the natural gas industry may be illustrated by reference to a March 1976 report to the House Committee on Appropriations by its Surveys and Investigations Staff where duplication in government data requests was described as a serious problem:

> "The most serious area of duplication and burden is in the reporting of reserves of oil and gas. At least six Federal agencies, including the Department of Transportation, FEA, FPC, FTC, the Securities and Exchange Commission (SEC), and GS [Geological Survey], have surveyed or are planning reserves studies. Since each agency defined things differently, a 'grass roots' data gathering and reporting effort is required for each study."

"Department of the Interior and Related Agencies Appropriations for 1977," hearings before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess. 394 (1976).

AGA proved reserves estimates in establishing natural gas rates and it has sustained the accuracy of those figures where challenged. *See, e.g., Shell Oil Company* v. *FPC, supra; American Public Gas Ass'n* v. *FPC*, 498 F.2d 718 (D.C. Cir. 1974); *In re Other Southwest Area Rate Cases (Shell Oil Co.* v. *FPC)*, 484 F.2d 469, 474 (5th Cir. 1973), *cert. denied*, 417 U.S. 973 (1974); *City of Chicago* v. *FPC*, 458 F.2d 731, 745-48 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *In re Hugoton-Anadarko Area Rate Case (California* v. *FPC)*, 466 F.2d 974, 988 (9th Cir. 1972). *Cf., Consolidated Gas Supply Corp.* v. *FPC*, 520 F.2d 1176, 1179, 1186 (D.C. Cir. 1975); *Public Service Commission of N.Y.* v. *FPC*, 487 F.2d 1043, 1098 (D.C. Cir. 1973), *vacated and remanded sub nom. Shell Oil Co.* v. *Public Service Commission of N.Y.*, 417 U.S. 964 (1974), *on remand*, 516 F.2d 746 (D.C. Cir. 1975).

2. Further, by drastically limiting, if not emasculating, the role of the district court while substantially expanding the appellate court's role in resolving factual disputes in subpoena enforcement proceedings, the court of appeals has, as a practical matter, all but foreclosed the recipients of such subpoenas from complaining of compliance burdens or the lack of relevance of the materials sought without being prepared to invest substantial resources in seeking appellate relief on essentially factual matters. Under the majority's theory, the district courts would become the agencies' "enforcers," bound to accept the broadest possible construction of an agency's investigative purpose, even where that purpose merely refers, without limitation, to the enforcement of statutes within the agency's jurisdiction.[40]

Another consequence of the decision below is that a party opposing an administrative subpoena may never

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[40] As the Dissent observes on this point, the Majority never even defined the "purpose" of the FTC investigation, much less did it employ a definable standard of appellate review. *See* Dissenting Op. at 25-26 (A. 93-94), 95-96 (A. 163-64).

have any meaningful opportunity to have its claims of confidentiality, relevance, burden or collateral estoppel heard in an adversary context. Here, for example, the Commission staff opposed petitioners' motions to quash but neither petitioners nor their counsel ever saw the staff's opposition. The staff's communication with the Commission itself was, and continues to be, *ex parte*, notwithstanding petitioners' requests to view and respond to the staff's opposition to their motions. And if the "limited role" [41] assigned to district courts by the decision below were to be accepted, the hearing in the district court would become just as meaningless as the "hearing" now available before the Commission on a motion to quash.

That the majority of the court of appeals considered the case of exceptional importance is evidenced by their *en banc* treatment. That the dissenters consider the issues even more important is evidenced not only by the vigor of the dissent, but also by their conclusion, where Judge Wilkey wrote:

> If [the precedent established by this case] is attempted to be . . . applied in the future, it will be a divergence from accepted practice of such magnitude that a close examination by our full court will be warranted, *if the errors of our four colleagues have not already received their just reward from an even higher authority.* (Dissenting Op. at 96 (A. 164); emphasis supplied.)

The radically divergent views advocated by the eight judges below manifests the appropriateness of review by this Court.

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[41] Majority Op. at 4 (A. 4).

B. In Holding the Doctrine of Collateral Estoppel Inapplicable in an Administrative Subpoena Enforcement Proceeding, the Court of Appeals Created a Conflict with the Decisions of Other Circuits and Acted Contrary to Apposite Rulings of this Court [42]

After a full hearing, the district court ruled that the FTC subpoenas were

> . . . improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission. . . .[43]

It is important that the district court did *not* deny the FTC access to documents which could be used collaterally to attack the FPC's prior finding. Instead, the court took the less restrictive approach of placing an entirely appropriate "use" restriction on certain data to be produced to the effect that production:

> . . . shall be made for the sole purpose of permitting the Trade Commission to investigate whether there is a *conspiracy* in the reporting of natural gas proved reserve estimates, and *not* for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves. (A. 59) (Emphasis supplied.)[44]

In reversing the district court's use limitation, the court of appeals first misstated the facts by asserting that: "the district judge accepted the producers' theory

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[42] *Compare* Majority Op. at 29-37 (A. 29-37) to Dissenting Op. at 72-90 (A. 140-58).

[43] A. 57-58.

[44] A similar "use" restriction was imposed in a recent investigative subpoena enforcement proceeding, *Lynn* v. *Biderman*, 536 F. 2d 820 (9th Cir.), *cert. denied*, 429 U.S. 920 (1976).

that in essence the FTC was investigating only a conspiracy to underreport proved reserves to the AGA." (Majority Op. at 31 (A. 31).) In fact, the district court neither "accepted" a theory proposed by the producers nor "imposed" its own theory as to the purpose of the investigation, but rather conducted a factual inquiry to determine that purpose. Indeed, it was the Federal Trade Commission itself which represented not only to the district court but to the Congress that the purpose of its investigation was to uncover any possible collusive conduct by the natural gas producers in the reporting of natural gas proved reserves estimates to the American Gas Association and in so doing to review the prior determinations of the FPC.[45]

The Majority further found that the district court's use restriction:

> . . . patently hamstrings the FTC's effort to compare various estimates made by the producers and necessitates constant vigilance by the Commission as to whether it has overstepped the bounds delineated by the court. (Majority Op. at 31 (A. 31).)

Beyond that, the court of appeals held it inappropriate, as a matter of law, to consider the issue of collateral estoppel at the subpoena enforcement stage of an investigatory proceeding. Each of these holdings conflicts with the decisions of other circuits and misapplies previous holdings of this Court.

1. *The Decision Below Conflicts with Decisions of This Court and Other Circuits Which Have Applied Collateral Estoppel to Administrative Action.*

This Court long ago held that an agency may be collaterally estopped from relitigating a factual determination where a prior finding on the same issue has been

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[45] Dissenting Op. at 28 (A. 96).

made by a different agency since, for purposes of collateral estoppel and *res judicata*, agencies of the same government are in privity with one another. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402-3 (1940). This basic principle was reaffirmed a decade ago by this Court's decision in *United States* v. *Utah Construction Co.*, 384 U.S. 394 (1966), wherein the Court held:

> Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381; *Hanover Bank* v. *United States*, 152 Ct.Cl. 391, 285 F.2d 455, *Fairmont Aluminum Co.* v. *Commissioner*, 222 F.2d 622; *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.*, 207 F.2d 255. *See also Goldstein* v. *Doft*, 236 F. Supp. 730, *aff'd*, 353 F.2d 484, *cert. denied*, 383 U.S. 960, where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator. (384 U.S. at 421-22.)

On at least two subsequent occasions, this Court has enforced repose as the result of administrative findings. *CIBA Corp.* v. *Weinberger*, 412 U.S. 640 (1973); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970).

Various circuits have applied these principles. The Eighth Circuit, in *George H. Lee Co.* v. *FTC*, 113 F.2d 583 (8th Cir. 1940), held that the FTC was collaterally estopped from claiming that a company was engaging in unfair methods of competition where the claim was based on factual issues resolved favorably to the company in a prior proceeding instituted under the Food and Drug

Act. Similarly, the Seventh Circuit, in *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944), sanctioned the defense of collateral estoppel in a proceeding under the Food and Drug Act where a prior proceeding before the Federal Trade Commission had resulted in a finding that the defendant's labeling claims were not deceptive.

More recently, in *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970), the Second Circuit held that the Maritime Administration, an agency within the Department of Commerce, was estopped from reinvestigating and redetermining an issue previously decided by the Federal Maritime Commission.

Even aside from the principles enunciated above, application of the doctrine of collateral estoppel is particularly warranted here, since the Federal Power Commission is the federal agency with special technical and scientific expertise as to factual issues involving the oil and gas industry and, as such, its findings of fact on such matters are entitled to the respect of other government agencies.[46] The FTC knew of the Power Commission's ad-

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[46] Under the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, the FPC —and that agency alone—is charged with broad and plenary responsibility in the regulation of the natural gas industry, with respect to rates and otherwise.

This Court has recognized the breadth of FPC regulation of the natural gas industry, and the fact that such regulation is "entrusted . . . to the informed judgment of the [Power] Commission, and not to the preferences of reviewing courts." *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968). This Court has also recognized that such a duty incorporates an obligation also to consider compliance with the antitrust laws as a factor included in the public interest standard under which the FPC operates, *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973). *See also Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 309 (1963).

Congress has recognized the unique expertise of the FPC to make factual determinations, including the amount and availability

[Footnote continued on next page]

judicatory proceedings in *So La II* when it initiated its own investigation into gas reserves reporting, and even declined the opportunity to intervene in those proceedings.[47] The FTC seeks a role in reviewing the FPC's factual decisions which this Court has denied even to a court of appeals in reviewing an FPC decision under Section 19 of the Natural Gas Act.[48]

2. *The Principles Announced by this Court in Endicott Johnson and Its Progeny Were Erroneously Extended by the Court Below to a New and Different Fact Situation.*

Notwithstanding the principle that collateral estoppel applies to administrative findings, and notwithstanding the FTC's own recognition that "collateral estoppel is . . . an immensely practical doctrine, rooted in considerations of fairness and the public policy favoring finality in litigation," [49] the court below improperly applied this Court's holding in *Endicott Johnson Corp.* v. *Perkins*, 317

[Footnote continued from previous page]

of natural gas reserves, and in recognition of the special nature of such FPC factual determinations Congress enacted Section 19 (b) of the Natural Gas Act, 15 U.S.C. § 717r(b), giving those findings "conclusive" status if supported by "substantial evidence." *See, e.g., Shell Oil Company* v. *FPC, supra*, 520 F.2d 1061. The Court of Appeals for the District of Columbia Circuit has itself recognized and emphasized the unique qualification of the FPC to perform a fact-finding function respecting natural gas proved reserves estimates. *City of Chicago* v. *FPC*, 458 F.2d 731 (1971), *cert. denied*, 405 U.S. 1074 (1972).

[47] *See* Dissenting Op. at 70 (A. 138).

[48] *See Mobil Oil Co.* v. *FPC*, 417 U.S. 283, 308 (1974).

[49] FTC Supplemental Brief on Rehearing *en banc* (filed March 31, 1976) at 10. It is also noteworthy that while the FTC has steadfastly opposed the application of collateral estoppel here, it has taken the contrary view when some advantage could be obtained. *See National Ass'n of Women's & Children's Apparel Salesmen, Inc.* v. *FTC*, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

U.S. 501 (1943), and its progeny [50] to preclude the application of administrative collateral estoppel in a subpoena enforcement proceeding. But what the court of appeals failed to take into account, in spite of the vigor of the dissent on this point, is that in *Endicott Johnson*, the rationale for the Court's decision preventing judicial intervention in the administrative process was to permit the Department of Labor to make a factual determination (which had not previously been made by Labor or any other agency) of whether the activities of the company were within its jurisdiction under the Walsh-Healy Act. *"Denying enforcement of the Secretary's subpoena would have the effect of preventing a determination of the coverage issue by the very person (the Secretary) authorized by the statute to make that determination."* [51]

Moreover, to the extent *Endicott Johnson* reflects a policy against non-intervention in administrative proceedings, that policy was fulfilled by the district court's order. The appropriate agency—the Federal Power Commission—applied its expertise in the *So La II* proceedings and made factual findings on the accuracy of American Gas Association proved reserves estimates based on a comprehensive record developed through sharply adversarial proceedings. The reviewing courts, including this Court, determined that the FPC's findings in *So La II* were supported by substantial evidence. Yet under the majority's construction, the FTC may reopen those findings and make new findings as to their va-

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[50] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *see also Feder. Maritime Commission* v. *Port of Seattle*, 521 F.2d 431 (9th Cir. 1975); *SEC* v. *Savage*, 513 F.2d 188 (7th Cir. 1975); *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *FTC* v. *Gibson*, 460 F.2d 605 (5th Cir. 1972).

[51] *See* Dissenting Op. at 74-75 (A. 142-43); emphasis in original.

lidity.[52] By permitting the FTC to proceed with those aspects of its investigation directed solely to relitigation of issues already determined by the Power Commission, and to attack collaterally certain of the FPC's factual findings, the court of appeals has created a situation whereby the FTC is given "carte blanche authority to investigate and relitigate a factual issue simply because it disagrees with another agency's findings." [53]

In short, to the extent any policy against interference with administrative proceedings is here dispositive, that policy was effected by the district court's order and the panel's affirmance upholding the integrity of the earlier expert FPC findings against collateral attack by the FTC.[54] If the majority's policy of total noninterference with administrative proceedings to the extent of permitting collateral reinvestigation of closed matters is adopted, then the result would be first that no administrative action would be "final," and second "the agencies, the courts, and the parties [would be subjected to] unnecessary and wasteful expenditures of time and money." [55] The additional possibilities for administrative overlap, inconsistent results and bureaucratic friction are limitless.[56]

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[52] While Judge Leventhal's concurring opinion argues that facts found in support of ratemaking can *never* be *res judicata*, the majority opinion technically did not reach that question, but its endorsement of the FTC's investigation has the same effect in that it opens the door to a redetermination of issues already finally decided subject to subsequent appellate review.

[53] Dissenting Op. at 73 (A. 141).

[54] *Id.* at 74 (A. 142).

[55] *Id.* at 73 (A. 141).

[56] For example, should the FTC conclude, upon examining the subpoenaed data, that the FPC was "hoodwinked" and the AGA data was unreliable, the FPC is not required to agree with this conclusion.

Nor are the Federal Power Commission's factual determinations any less binding on the FTC because they were made in a rate-making proceeding for rate-making purposes.[57] In the FPC's *So La II* proceeding, "[a]ll evidence was developed in an adversarial environment with public and private parties representing sharply opposing interests participating at all stages."[58] Witnesses were subjected to rigorous cross-examination and an opportunity for rebuttal evidence was provided.[59] Based on this adversarial record, the FPC staff concluded that ". . . the validity and reliability of the reported AGA [proved] reserves data [was established] beyond any reasonable doubt."[60] The Power Commission itself found that AGA proved reserves estimates (for the same period covered by the FTC investigation) had not been "impeached or substantially contradicted" (46 F.P.C. at 113) and that they were "reasonably reliable" for rate-making purposes (*id.* at 116). In these circumstances, the label placed on the proceeding should be of no consequence for purposes of determining the applicability of *res judicata* or collateral estoppel principles. This has been plainly recognized by those circuits where the issue has arisen (including the District of Columbia Circuit).[61] *See generally*

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[57] *See, e.g.*, the Court of Appeals for the Eighth Circuit's finding in *Murphy Oil Corp.* v. *FPC*, 431 F.2d 805, 810 (8th Cir. 1970), holding that the Power Commission has no power to change rates retroactively relying on this Court's holding in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

[58] Dissenting Op. at 82 (A. 150).

[59] *See So La II*, 46 F.P.C. at 113 and 115; Dissenting Op. at 82, n.153 (A. 150 n.153).

[60] Brief Reprinted in Hearings on Concentration by Competing Raw Fuel Industries in the Energy Markets & Its Impact on Small Business, Before the Subcomm. on Special Small Business Problems of the House Select Comm. Small Business, 92d Cong., 1st Sess. at A72 (1971).

[61] *E.g.*, *Murphy Oil Corp.* v. *FPC*, 431 F.2d at 810; *A. Duda & Sons Cooperative Ass'n* v. *United States*, 495 F.2d 193 (5th Cir. 1974); *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973). The issue has never before been squarely presented to this Court.

Arizona Grocery v. *Atchison, T & S.F. Ry.*, 284 U.S. 370 (1932); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

The principles announced by the lower court are directly contradictory of the Second Circuit's opinion in *Safir* v. *Gibson, supra*, where administrative collateral estoppel was applied by the court to halt an administrative investigation. Both Judge Friendly in *Safir*, and the dissent below, were acutely aware that the concepts of *res judicata* and collateral estoppel differ from the defenses raised in cases such as *Endicott Johnson*, where in each the respondents contended that the agencies lacked jurisdiction and where the data sought were needed for the very purpose of determining the jurisdictional question. As Judge Friendly explained, in language equally applicable here:

> [T]he reason for applying *res judicata* to administrative agencies is not only to 'enforce repose' but also to protect a successful party from being vexed with needlessly duplicitous proceedings. . . . If the latter interest is not protected at the outset of the second proceeding [the investigative stage], it will be lost irreparably. In this respect, a claim of administrative *res judicata* differs from a claim that an agency has no jurisdiction over the subject matter of the investigation . . . an issue which Congress meant to be decided in the first instance by the agency itself.[62]

The FTC is in the same position as the second agency was in *Safir*: ". . . the quantum of evidence to support or refute the [FPC's] determination is not relevant. The only issues are what that agency in fact determined and whether that determination is binding on the [FTC]." *Id.* at 144. And, like *Safir*, where the FTC seeks the aid of this Court in undertaking this second proceeding, "there is nothing to be gained and much to be lost by

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[62] 432 F.2d at 143-44 (citations omitted). *See also* Dissenting Op. at 76-77 (A. 144-45).

waiting for the agency to finish its deliberation without receiving proper instructions." *Id.* at 144-45.

In failing to give effect to these crucial distinctions, the decision below presumed that the district court and the unanimous panel had based their application of collateral estoppel upon prescience, or their ability to "forecast" the "probable results" of the investigation (Majority Op. at 34 (A. 34)). But, as the dissent makes clear, both the panel and the district court were ". . . able to apply the doctrine of collateral estoppel without so much as a passing glance into [their] crystal ball." [63]

The Majority thus appears to have gone seriously awry in overlooking the difference between claim preclusion and issue preclusion. Application of *res judicata* bars a subsequent action based on the same underlying cause of action or involving the same claims or defenses, whereas application of the more limited principle of collateral estoppel only makes conclusive upon the parties certain questions of *fact* determined in a prior action involving the parties, or their privies.[64] Recognizing this distinction, it is obvious that neither the district court nor the unanimous panel needed to forecast the ultimate conclusion, or even the ultimate issue, of the FTC's investigation. Rather, they simply defined a single factual issue already determined by the FPC which was not open to FTC reconsideration (the accuracy of AGA proved reserve estimates for the same years and geographic areas the FTC sought to investigate) and gave the Trade Commission free rein to investigate and determine all other issues.

It was apparently this failure to consider adequately the difference between issue preclusion and claim preclu-

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[63] Dissenting Op. at 77 (A. 145).

[64] *Cromwell* v. *County of Sac*, 94 U.S. (4 Otto) 351 (1877); *see generally* K. Davis, *Administrative Law Treatise*, §§ 18.01-18.12; *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 840 (1952).

sion [65] which led the four-judge majority to rely upon inapposite cases not in conflict with either the dissent or the view of petitioners, *FTC* v. *Feldman*, 532 F.2d 1092 (7th Cir. 1976); *FTC* v. *Markin*, 532 F.2d 541 (6th Cir. 1976). Those cases each involved claim preclusion (*res judicata*), not issue preclusion (collateral estoppel). In each case, the preclusion urged by the respondent involved a vastly different time period (twenty-nine years had elapsed). It is almost too obvious to require mention that changed facts and law could easily justify an investigation after the passage of twenty-nine years. Here, however, the FTC proposes to examine the reporting of natural gas proved reserves for precisely the same period of time, precisely the same geographic area, and precisely the same companies and for precisely the same purpose encompassed by the Power Commission's investigations and findings.[66]

Moreover, in both *Feldman* and *Markin*, the companies sought to stop the FTC investigation and any adjudication or other proceeding which might have followed, in their entirety. Here, petitioners have neither sought to bar the FTC investigation nor asserted that the FPC's findings immunized them against any investigation or other proceeding.[67] Rather, petitioners assert only that the

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[65] The D.C. Circuit itself recently had occasion to note that distinction in *Stebbins* v. *Keystone Ins. Co.*, 481 F.2d 501 (D.C. Cir. 1973), citing Tentative Draft No. 1 of Chapter 3 of Restatement, Second, Judgments.

[66] It was on this exact point that the Seventh Circuit in *FTC* v. *Feldman* distinguished the panel's unanimous decisions in this case. *See* 532 F.2d at 1097.

[67] In these circumstances, the Majority's reliance upon *United States* v. *RCA*, 358 U.S. 334 (1959), is erroneous. In *RCA*, the issue was whether an agreement approved by the Federal Communications Commission immunized that agreement from future antitrust attack by the Justice Department. *RCA* was one of a long line of cases involving the rather different questions of exclusive and primary jurisdiction. There, the question presented was whether execution of the agreement would serve the public interest, not whether the antitrust laws had been violated, 358 U.S. at 352. No such issue is here present.

FPC's factual findings relating to the accuracy of proved natural gas reserves for the geographic area and during the time span encompassed by the FTC's investigation must be taken as established fact.

C. The Court of Appeals Applied an Erroneous and Wholly Improper Standard of Appellate Review Contrary to the Decisions of this Court and in Conflict With the Standards Mandated by Other Circuits

In reviewing the case *de novo*, the four-judge majority essentially duplicated the trial court proceeding but without benefit of the lower court's intimate knowledge of the record. Indeed, in many important respects, the four-judge majority acted more like a trial court than an appellate tribunal. Thus, in reversing the trial court, the *en banc* court went through the subpoena item by item, ordered the parties to engage in settlement conferences and even received evidentiary material which was not presented to the district court and which, in any event, was irrelevant and hence improperly considered.[68] In so doing, the Majority below ignored the pronouncement of this Court in *United States* v. *Nixon*, 418 U.S. at 702, that enforcement of a "subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues."

In limiting the items to be produced to material containing data on *proved* reserves and their reporting, and in modifying the Commission's subpoenas in other respects, the district court acted on two separate and independent factual grounds, wholly apart from the matter of collateral estoppel. First, the court considered the relevance of the data sought to the purpose of the FTC investiga-

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[68] *See, e.g.*, Majority Op. 45, n.66 (A. 45, n.66), where the Majority refers to "evidence which was, of course, not available to the district court." The "evidence" referred to by the Majority was never even formally introduced into the record as in district court proceedings.

tion, taking into account the FTC's resolution and the refinement of that purpose as represented by the FTC to Congress and by its counsel to the district court. *See, Montship Lines Ltd.* v. *Federal Maritime Board,* 295 F.2d 147 (D.C. Cir. 1961); *Hellenic Lines Ltd.* v. *Federal Maritime Board,* 295 F.2d 138 (D.C. Cir. 1961). Second, the court considered the burdensomeness of producing material already twice or thrice furnished.

The district court's action was founded upon factual bases derived after lengthy hearings and the submission of substantial evidentiary material. In this context, the trial court exercised its discretion in making factual findings and applying those findings to the case "to determine questions to which no strict rule of law [was] applicable but which, from their nature, and the circumstances of the case, [were] controlled by the personal judgment of the court." *Delno* v. *Market Street Ry.*, 124 F.2d 965, 967 (9th Cir. 1942). The district court's order was well within its discretion, and should not have been set aside unless clearly erroneous, or unless it abused this discretion. This Court, and the federal appellate courts generally, have long honored this fundamental principle governing the relationship between trial and appellate courts,[69] which applies equally to the government as to other litigants.[70]

Nonetheless, the Majority below utterly and consciously disregarded those accepted and usual appellate standards of review, and instead substituted its own factual judgments for the factual judgments of the district court in

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[69] *E.g., United States* v. *Nixon,* 418 U.S. at 702 (a trial court decision on a subpoena must be upheld unless "the trial court finding was without record support"); *Shasta Minerals & Chemical Co.* v. *SEC,* 328 F.2d at 288; *Lowes* v. *Pan-American Life Ins. Co.,* 355 F.2d at 436; *Sue* v. *Chicago Transit Authority,* 279 F.2d at 419; *NLRB* v. *Northern Trust Co.,* 148 F.2d at 29; *Shotkin* v. *Nelson,* 146 F.2d at 404; *Delno* v. *Market Street Ry., supra.*

[70] *United States* v. *Yellow Cab Co.,* 338 U.S. 338 (1949).

the areas of relevance and burden. As to relevance, the Majority justified its failure to apply the usual appellate review standards by reason of some "integral" relationship between the district court's relevance determinations and its "legal premise," [71] an approach expressly condemned by the Ninth Circuit long ago in *Delno* v. *Market Street Ry., supra.* As to its reversal of the district court's burdensomeness determinations, the Majority justified its action not by virtue of some clearly erroneous determination or abuse of discretion by the district court, but rather by substituting its judgment for that of the district court and rationalizing that the trial court's factual determinations were "intimately tied" to and "colored by" improper applications of relevance and collateral estoppel, and hence could be reviewed for "mere error," [72] directly contrary to the teachings of the Eighth Circuit in *Lowes* v. *Pan American Life Insurance Co., supra.* Indeed, the Majority seemed to determine, as a matter of law, that certain of the elements of burden—repetition and cumulativeness—must be excused where agency jurisdictions overlap. This conclusion was a logical and necessary extension of its unwarranted refusal to consider collateral estoppel in a subpoena enforcement proceeding.

We emphasize here that the decision below represents a decision of the Court of Appeals for the District of Columbia, sitting *en banc.* That a federal appellate court should make it a practice of redetermining facts found by a trial court is bad enough, but it borders on being egregious when an *en banc* court should do so. The district court held extensive hearings and issued its de-

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[71] Majority Op. at 25-26, n.29 (A. 25-26, n.29).

[72] Majority Op. at 37-39 (A. 37-39). The Majority also observed extrajudicially that companies not alleging improper burden had no undue difficulty complying with the subpoena. This, apparently, led the Majority to determine as a factual matter that companies claiming such a burden were not to be believed. Majority Op. at 40, n.55 (A. 40, n.55).

cision in a period of some nine months. Since then, over some three years time, the court of appeals considered and redetermined disputed factual issues, but without benefit of the knowledge of the record of the trial court.

This Court has had occasion in the recent past to intervene in other contexts where the Court of Appeals for the District of Columbia Circuit has improperly substituted its judgment of the facts for the judgment of the proper fact-finder. *NLRB* v. *Pipefitters Local 638*, —— U.S. ——, 45 U.S.L.W. 4144 (1977), *FPC* v. *Transcontinental Gas Pipe Line*, 423 U.S. 326, 330 (1976). The impropriety here is as flagrant as it was in those cases, and considerably more far reaching insofar as it affects the reviewability of virtually every agency's subpoenas, and thus impacts upon those myriad of enterprises and individuals subjected to such subpoenas.

1. *Relevance Determinations.*[73]

The Majority accused the district court of "speculat-[ing] about the possible charges that might be included in a future complaint, and then . . . determin[ing] the relevance of the subpoena requests by reference to those hypothetical charges." [74] But the district court "was not trying to *mold* the scope of the investigation, but rather to define it; this was not an imposition of the court's view but an inquiry made of those conducting the investigation." [75]

The district court's factual findings which resulted in restricting the FTC's subpoena to matters pertinent to "proved reserves" logically followed from the following facts:

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[73] *Compare* Majority Op. at 19-29 (A. 19-29) to Dissenting Op. at 25-58 (A. 93-126).

[74] Majority Op. at 22 (A. 22).

[75] Dissenting Op. at 32 (A. 100).

(1) Employees of petitioners reported *only* proved reserves to the AGA; and

(2) Proved reserves relate broadly to portions of natural gas reservoirs which have been flow tested—wells have been drilled—and have been demonstrated to be reasonably certain to contain recoverable quantities of natural gas under existing economic and operating conditions.

The FTC's representations to the district court and to Congress were that the subpoena revolved around one central premise: to investigate collusion by comparing estimates of proved natural gas reserves submitted by employees of petitioners to the AGA with reserves estimates used by the companies for internal purposes.[76] The Commission further confirmed that the purpose of the investigation was to "get at" proved reserves estimates already made by the Federal Power Commission.[77]

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[76] In response to questions from the district court, counsel for the FTC responded as follows:

> [FTC Counsel]: . . . [W]hat we are investigating is possible collusive conduct by the natural gas producers in the reporting of these [proved] reserves.
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> * * *
>
> [FTC Counsel]: . . . What we want to find out is whether or not in reporting natural gas reserves there has been collusive conduct in the way these estimates are prepared.
>
> The Court: Reporting them to whom.
>
> [FTC Counsel]: All right. Reporting them to the American Gas Association, because the American Gas Association data is the only available published data on these reserves. (Transcript of December 13, 1973, Hearing, cited in Dissenting Op. at 28 (A. 96).)

[77] Dissenting Op. at 28-29, n.47 (A. 96-97, n.47). FTC Commissioner Dixon also testified on behalf of the FTC that it was their view that the investigation was, in effect, an oversight review of Federal Power Commission proceedings, *see* note 19, *supra*.

In these circumstances, the district court could hardly have been clearly erroneous in its finding as to purpose, or abused its discretion in limiting enforcement of the subpoenas to documents containing or underlying proved reserves estimates. As the dissenting opinion makes clear:

> By the Trade Commission's own admissions, before the District Court, in briefs to the court, and in representations to Congress, these were the only documents relevant to the Trade Commission's investigation. (Dissenting Op. at 29 (A. 97); footnote omitted.)

Indeed, if the FTC were to be permitted to determine the accuracy of Petitioners' proved reserves estimates provided to the AGA by comparing other types of estimates, in the dissent's words, the FTC would be allowed to "perpetuat[e] a terrible hoax on the American people." [78]

The *en banc* court believed that the FTC could "fairly inquire" whether the AGA definition of "proved" reserves was too restrictive.[79] But the key issue is whether the reserves estimates were deliberately low *for the purpose of influencing the ceiling price* established by FPC.[80] In its costing methodology, the FPC compared *reserves added* (as estimated by AGA) with *drilling* costs to arrive at a *unit* cost (¢ per Mcf) for gas. Even if other estimates of reserves could be said to be "realistic and reliable" (Maj. Op. p. 24 (A. 24)), if they are not *proved* (i.e. *drilled*) they are inappropriate for use in a unit cost study, which measures the cost of reserves added *by wells already drilled.*

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[78] Dissenting Op. at 56 (A. 124).

[79] Majority Op. at 24 (A. 24).

[80] Dissenting Op. at 86-88 (A. 154-56).

The Majority below examined the relevance issues as if it were reviewing the matter *de novo*. While appearing to recognize that the relevance of the FTC's subpoena requests had to be measured against the purpose of its investigation,[81] as noted by the Dissent, the Majority does not:

> define the FTC's 'purpose' in the investigation, nor does it purport to employ a standard of appellate review which is legally definable. (Dissenting Op. at 25 (A. 93).)

In any event, even assuming the Majority looked to the FTC's resolution authorizing the use of compulsory process as a benchmark by which to measure the relevance of certain of the subpoenaed materials, it is plain that courts in the D.C. Circuit and other circuits have refused enforcement of administrative subpoenas where the agency's statement of purpose[82] was too broad, too vague, or otherwise not sufficient to permit a relevance determination.[83] Following this line of authority, the district court acted reasonably in seeking some refinement of the FTC's broad resolution so that a proper relevance determination could be made.[84] This type of factual

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[81] Majority Op. at 21-122 (A. 21-22).

[82] The Commission's Rules of Practice and Procedure require that: "Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation." 16 C.F.R. § 2.6 (1977). The FTC was bound by the law scrupulously to follow this rule, *Pacific Molasses Co.* v. *FTC*, 356 F.2d 386, 389 (5th Cir. 1966); *United States* v. *Associated Merchandising Corp.*, 261 F. Supp. 553, 559 (S.D.N.Y. 1966).

[83] *Supra* at 32-33.

[84] *See* Dissenting Op. at nn.44-45 (A. 112-13, nn.44-45) and accompanying text. The language of the resoluiton (A. 287-88) encompasses every phrase and aspect of petitioners' natural gas operations, and its general reference to Section 5 of the FTC Act, and a purpose to investigate thereunder, encompasses as broad an area of inquiry as could be imagined. Similar agency resolutions

inquiry is strictly within the province of the district court, especially where the only alternative might well have been to find the resolution impermissibly vague and overbroad, thus rendering unenforceable the FTC's entire subpoena.

Having no basis for holding that the district court abused its discretion or was clearly erroneous, the court of appeals instead "wriggle[d] and twist[ed] to avoid applying the proper standard of review," [85] finally positing the view that the district court's relevance determinations were "inseparable from its view of the applicable law with respect to the proper scope of the FTC investigation." [86] But in fact, the district court did what trial judges are supposed to do: it developed the necessary factual foundation to make a ruling on relevance. The court did not impose on the FTC's investigation any particular scope or limit; rather, the court made inquiry of those conducting the investigation and made findings based on the FTC's representations.

What the four-judge majority has really done is to redefine in subtle albeit crucially important terms the relationship between the district courts and the courts of appeals. Even assuming, *arguendo*, that there was a "legal premise" upon which the factual relevance determination was made, the Majority's new standard of review has serious implications, since all fact determinations made in pursuit of a relevance determination (the

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have repeatedly been held invalid. *Montship Lines Ltd.* v. *Federal Maritime Board*, 295 F.2d at 154-55; *Hellenic Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d at 140; *FTC* v. *Green*, 252 F. Supp. 153 (S.D.N.Y. 1966). *See also United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Adams* v. *FTC*, 296 F.2d 861 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962); *Application of General Motors Corp.*, 213 F. Supp. 255 (S.D.N.Y. 1961).

[85] Dissenting Op. at 31 (A. 99).

[86] Majority Op. at 25, n.29 (A. 25, n.29).

"legal premise")[87] would be subject to such uncontrolled and subjective appellate review. As the Dissent summed up this point:

> The failure to explain the circumstances under which the mere existence of a 'legal premise' can trigger de novo review in the appellate court is most disturbing . . . [T]he majority has established a standard which can be employed by the simple unexplained step of denominating a trial court's decision as resting on a 'legal premise.' . . . The directionless, standardless review employed by the majority in order somehow to vindicate a 'legal premise' does no credit to an appellate tribunal. (Dissenting Op. at 36-37 (A. 104-05); *see also* Dissenting Op. at 58 (A. 126).)

The approach followed by the court below stands the traditional role of district court versus appellate court on its head; expanding the role of the latter while constricting the role of the former.

2. *Burden Determinations.*[88]

Under standards determined by this Court, *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967), the district court was obliged to consider the reasonableness of the compliance burden placed upon petitioners. Where this consideration results in a finding that compliance would be unduly burdensome in light of the purposes of the investigation and the repetitive nature of the inquiry, the district court has the discretion to modify the subpoena in a manner so as to mitigate the burden, and modifications thus made may not be set aside on appeal absent

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[87] As noted by the Dissent, "The FTC resolution, the FTC counsel's answers to questions, the FTC statements to Congress . . . , all are evidentiary *facts* as to the Commission's stated purpose of its inquiry." Dissenting Op. at 31 (A. 99); emphasis original.

[88] *Compare* Majority Op. at 37-42 (A. 37-42) to Dissenting Op. at 58-66 (A. 126-34).

some demonstrable abuse of discretion by the district court.[89]

After giving thorough and deliberate consideration to the countervailing *factual* considerations, the district court found that, in certain respects, compliance with the subpoena would be unduly cumulative and duplicative of FPC investigations which included a massive, nationwide check of the accuracy of AGA reserves estimates[90] as well as the protracted *So La II* proceeding, hence it carefully limited and modified the subpoena.[91]

While the court of appeals acknowledged it was departing from the usual standard of review set forth above, it nonetheless determined to review the district court's modifications relating to burden for the reason that they

> . . . were colored in a substantial measure by an erroneous concept of the FTC purpose, and rested at least in part on improper applications of collateral estoppel and relevance . . . . (Majority Op. at 39 (A. 39).)

Thus did the Majority find its way to a standard of review so attenuated as to be no standard at all, and under

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[89] *Penfield Co.* v. *SEC*, 330 U.S. 585 (1947); *FTC* v. *Lonning*, 539 F.2d 202, 211 (D.C. Cir. 1976); *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945); *FCC* v. *Cohn*, 154 F. Supp. 899, 912 (S.D.N.Y. 1957). *See generally* Dissenting Op. pp. 58-60, nn. 108-09 (A. 126-28, nn. 108-09); n.69, *supra*, and accompanying text.

[90] *See* Dissenting Op. at 19-20 (A. 87-88).

[91] Those modifications were as follows: (1) production of documents under certain specifications was limited to a random sample of the relevant fields, and to a limited time period; (2) the companies were accorded the option of producing the documents for inspection at the location where they were stored; (3) the period of compliance was extended to 180 days; and (4) reserves data for 1962-68 years was eliminated.

that rationale disapproved wholesale *all* of the district court's modifications.[92]

Entirely apart from any issue of collateral estoppel, the district court was obliged to and did consider the repetitive and cumulative nature of the FTC subpoena in view of, *inter alia*, the Federal Power Commission's previous factual determinations. However, the four-judge majority opinion appears to hold that such *factual* considerations must be disregarded, and that repetition and cumulativeness must be excused as a matter of law where agency jurisdictions overlap, notwithstanding the contrary instruction of this Court. *Cf. S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972). *See also Safir* v. *Gibson, supra.*

The Majority further disregarded the accepted and usual standards of appellate review by seeking support outside the record for its view of the facts relating to the burden issue. Thus, the Majority relied, in part, upon the fact that three companies not involved in this litigation were able to comply with the subpoenas "with-

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[92] Thus, the Majority overturned even the district court's modifications designed to protect the confidentiality of any documents produced. (Majority Op. at 42 (A. 42); *compare* Dissenting Op. at 90-94 (A. 158-62).) Under the district court's order, the Secretary of the FTC would be designated the custodian of the documents; the documents would be kept in a depository with restricted access; documents could be used for purposes unrelated to the investigation only with the court's permission, and at the termination of the investigation, the documents would have to be returned to their owner. In reversing the district court on this point, the Majority left the confidentiality of the documents to the unbounded discretion of the FTC, which, in the past, had, without prior notice, released similar documents it had pledged to keep confidential to a Member of Congress who had requested them by telephone. (*See* Dissenting Op. at 4-5, n.3 (A. 72-73, n.3). The only apparent basis for the Majority's decision in this respect was its view that "the Commission apparently could not use the documents in an adjudicatory proceeding without gaining the court's permission." (Majority Op. at 42 (A. 42).) Such a view was patently wrong inasmuch as the parties had stipulated that the very opposite was the case. (A. 173; *see also* Dissenting Op. at 92-94 (A. 160-62).)

out undue effort." [93] First, those "facts" are not a part of the record and there is no indication as to how complete or thorough their compliance was. But second, even hypothesizing that these facts were fully developed, it is hardly surprising that there was less of a burden for those companies than for the petitioners here. Those companies never claimed any burden comparable to the burdens claimed by petitioners and found by the district court. The only inference worthy of consideration from the "new evidence" found by the Majority is either that the three companies had smaller operations in Southern Louisiana than petitioners or that they had record-keeping systems more compatible with requirements of the FTC's subpoena. If the burdens of compliance had been more considerable, doubtless they too would have raised objections.[94]

Finally, in stating that the burden of showing the unreasonableness of the request was on the subpoenaed party, and then claiming that such a burden had not been met,[95] the court of appeals again utilized a standard of review consistent with *de novo* consideration of agency action. However, these factual determinations were for the district court and, once made, the FTC was ". . . in the unenviable position of sustaining the great burden of showing an abuse of discretion." [96]

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[93] One such company informed the FTC that 2,028 man-hours were spent gathering the documents. The other two companies each provided the documents to the FTC within three months. Majority Op. at nn.55 and 66 and accompanying text.

[94] The Majority also found that the Petitioner Mobil's statement that its compliance burden has been lessened as a result of extensive negotiation with FTC attorneys is, in effect, binding on all other petitioners. *Id.* Aside from the faulty logic of the proposition, it is simply another instance of the Majority's proclivity to assign to itself the fact finding role of a trial court long after the record has been closed.

[95] Majority Op. at 39 (A. 39).

[96] Dissenting Op. at 60-61, 65 (A. 128-29, 133); *see generally* cases cited at n.69, *supra*.

The practical effect of these holdings, premised upon undisciplined and highly subjective standards of appellate review, is to leave the district courts without discretion—powerless to ameliorate the effects of cumulative, repetitious and unduly burdensome agency demands.[97] The district courts become mere rubber stamps in the enforcement of administrative subpoenas. Such a result would create bureaucratic competition having the characteristics of "a Kafka nightmare in which no response to an agency is ever sufficient because of the needs of a competing agency to show the insufficiency of a prior response to the former agency." [98]

Having devised for itself an erroneous and utterly improper standard of review by which it circumvented the accepted and usual standards, the four-judge majority not only committed serious error, with the potential of undermining the judicial reviewability of agency subpoenas, but it strayed so far from those standards as to call for the exercise of this Court's powers of supervision. *Cf. Gibson* v. *Lockheed Aircraft Co.*, 350 U.S. 356 (1956).

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[97] A striking example of the appellate court's failure to accord any respect to the district court is the decision of the Majority to expand greatly the producer's obligations under the subpoena, while at the same time shortening the period of compliance from 180 to 90 days. Such a modification to the district court's order is utterly unjustified under any standard of appellate review, even that which the majority devised for itself.

[98] Dissenting Op. at 62 (A. 130).

CONCLUSION

The petition for a writ of certiorari should be granted.

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